Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Hieu Trung Mai, D.D.S.
(O.I. File No. H-10-40553-9),

Petitioner

v.

The Inspector General,
Department of Health and Human Services.

Docket No. C-11-764

Decision No. CR2494

Date: January 25, 2012

DECISION

Petitioner, Hieu Trung Mai, D.D.S., is excluded from participating in Medicare, Medicaid, and all federal health care programs pursuant to section 1128(a)(1) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(1)), effective August 18, 2011, based upon his conviction of a criminal offense related to the delivery of an item or service under Medicare or a state health care program. There is a proper basis for exclusion. Petitioner's exclusion for the minimum period[1] of five years is mandatory pursuant to section 1128(c)(3)(B) of the Act (42 U.S.C. § 1320a-7(c)(3)(B)).

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[1] Pursuant to 42 C.F.R. § 1001.3001, Petitioner may apply for reinstatement only after the period of exclusion expires. Reinstatement is not automatic upon completion of the period of exclusion.

I. Background

The Inspector General (I.G.) for the Department of Health and Human Services (HHS) notified Petitioner by letter dated July 29, 2011, that he was being excluded from participation in Medicare, Medicaid, and all federal health care programs for a period of five years, the minimum statutory period. The I.G. advised Petitioner that he was being excluded pursuant to section 1128(a)(1) of the Act based on his conviction in the Superior Court of California, County of Orange, of a criminal offense related to the delivery of an item or service under Medicare or a state health care program.

Petitioner timely requested a hearing by letter dated August 30, 2011. The case was assigned to me for hearing and decision. A prehearing telephone conference was convened on September 28, 2011, the substance of which is memorialized in my order of the same date. During the prehearing conference, Petitioner, who appeared with his office manager, waived an oral hearing. Accordingly, I set a briefing schedule for the parties.

The I.G. filed a motion for summary judgment[2] and a supporting brief (I.G. Br.) on October 27, 2011, with I.G. exhibits (I.G. Exs.) 1 through 8. Petitioner filed a brief in opposition to the I.G. motion on November 28, 2011 (P. Br.), with no documentary evidence. The I.G. filed a reply brief on December 13, 2011. No objections have been made to my consideration of the offered exhibits, and all are admitted.

II. Discussion

A. Applicable Law

Petitioner's rights to an administrative law judge (ALJ) hearing and judicial review of the final action of the HHS Secretary (Secretary) are provided by section 1128(f) of the Act (42 U.S.C. § 1320a-7(f)).

The standard of proof is a preponderance of the evidence, and there may be no collateral attack of the conviction that provides the basis of the exclusion. 42 C.F.R.

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[2] Petitioner waived an oral hearing. Therefore, a motion for summary judgment is not necessary or appropriate. Rather, I may resolve this case on the merits, judging the credibility and weight of the evidence and resolving any disputes of material fact. *See e.g. Lyle Kai, R.Ph.,* DAB No. 1979 (2005).

§ 1001.2007(c), (d). Petitioner bears the burden of proof and the burden of persuasion on any affirmative defenses or mitigating factors, and the I.G. bears the burden on all other issues. 42 C.F.R. § 1005.15(b).

B. Issue

The Secretary has by regulation limited my scope of review to two issues:

> Whether there is a basis for the imposition of the exclusion; and
>
> Whether the length of the exclusion is unreasonable.

42 C.F.R. § 1001.2007(a)(1).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are set forth in bold followed by the pertinent findings of fact and analysis.

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. There is a basis to exclude Petitioner pursuant to section 1128(a)(1) of the Act.

There is no dispute that Petitioner's request for hearing was timely and I have jurisdiction

On September 10, 2010, Petitioner pled guilty in the Superior Court, Orange County, California, to a misdemeanor offense of "Presenting False Medi-Cal Claims." I.G. Ex. 2, at 2, I.G. Ex. 4, at 1; I.G. Ex. 5. The state court accepted Petitioner's guilty plea, suspended imposition of sentence, and placed Petitioner on three years informal probation. I.G. Ex. 4, at 2-3. On August 17, 2011, Petitioner's motion to withdraw his guilty plea was granted based upon his compliance with his terms of probation, and his case was dismissed. I.G. Ex. 8.

The I.G. cites section 1128(a)(1) of the Act as the basis for Petitioner's mandatory exclusion. I.G. Ex. 1. The statute provides:

> (a) MANDATORY EXCLUSION. The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f)):

> (1) Conviction of program-related crimes. Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII or under any State health care program.

The statute requires that the Secretary exclude from participation in Medicare or Medicaid any individual or entity: (1) convicted of a criminal offense, whether a felony or a misdemeanor; (2) where the offense is related to the delivery of an item or service; and (3) the delivery of the item or service was under Medicare or a state health care program.

I conclude that Petitioner was convicted of a criminal offense within the meaning of section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)). Pursuant to section 1128(i) of the Act, an individual is "convicted" of a criminal offense when: (1) a judgment of conviction has been entered by a federal, state, or local court whether or not an appeal is pending or the record has been expunged; (2) there has been a finding of guilt in a federal, state, or local court; (3) a plea of guilty or no contest has been accepted in a federal, state, or local court; or (4) an accused individual enters a first offender program, deferred adjudication program, or other arrangement where a judgment of conviction has been withheld. Petitioner argued in his request for hearing that his motion to withdraw his guilty plea was granted, a plea of not guilty was entered on the record by the state court, and his state prosecution was dismissed. Petitioner reasons that he was not convicted and that he should, therefore, not be excluded. Petitioner's argument is without merit. The evidence shows that Petitioner entered a guilty plea that was accepted by the state court. P. Ex. 4, at 2-3. Therefore, Petitioner was convicted within the meaning of section 1128(i) of the Act, when his guilty plea was accepted. Petitioner was also "convicted" within the meaning of section 1128(i)(4) of the Act even though judgment was withheld pending completion of the terms of probation, and even though the charges were eventually dismissed after he successfully completed part of the term of informal probation. Congress is clear in section 1128(i) of the Act that one is "convicted" even if the record is subsequently expunged, or judgment is withheld as part of a first offender program, deferred adjudication program, or a similar program.

I also conclude that Petitioner's conviction was program-related within the meaning of section 1128(a)(1) of the Act. The crime to which Petitioner pled guilty – "Presenting False Medi-Cal Claims" – is clearly an offense related to the delivery of an item or service under the California Medicaid program. Thus, there is a "nexus or common-sense connection" between Petitioner's criminal conduct and the delivery of an item or service under the California Medicaid program. *Timothy Wayne Hensley*, DAB No. 2044 (2006); *Lyle Kai, R.Ph.*, DAB No. 1979 (2005); *Neil Hirsch, M.D.*, DAB No. 1550 (1995); *Berton Siegel, D.O.* DAB No. 1467 (1994). Accordingly, I conclude that the elements necessary for exclusion pursuant to section 1128(a) of the Act are satisfied.

There is a basis for Petitioner's exclusion, and his exclusion is mandated by section 1128(a)(1) of the Act.

Petitioner argues that permissive exclusion under section 1128(b)(1)(A) of the Act should be applied in his case rather than mandatory exclusion pursuant to section 1128(a)(1) of the Act. Petitioner points out that a permissive exclusion under section 1128(b) carries a three year period of exclusion rather than the five years required for exclusion under section 1128(a). P. Br. at 4-5. Contrary to Petitioner's assertion, the I.G. has no discretion to elect to impose a permissive exclusion under section 1128(b) of the Act when the elements for a mandatory exclusion under section 1128(a) of the Act are satisfied, as they are in this case. *Stacy Ann Battle*, DDS, DAB No. 1843 (2002); *Lorna Fay Gardner*, DAB No. 1733, at 5 (2000).

4. Pursuant to section 1128(c)(3)(B) of the Act, five years is the minimum period of exclusion pursuant to section 1128(a) of the Act.

5. Petitioner's exclusion for five years is not unreasonable as a matter of law.

Section 1128(c)(3)(B) of the Act provides that an exclusion imposed under section 1128(a) of the Act shall be for a minimum period of five years. Pursuant to 42 C.F.R. § 1001.102(b), the period of exclusion may be extended based on the presence of specified aggravating factors. Only if the aggravating factors justify an exclusion of longer than five years are mitigating factors considered as a basis for reducing the period of exclusion to no less than five years. 42 C.F.R. § 1001.102(c). The I.G. does not cite any aggravating factors in this case and does not propose to exclude Petitioner for more than the minimum period of five years.

I have concluded that Petitioner's exclusion is required by section 1128(a)(1) of the Act. Accordingly, the minimum period of exclusion is five years, and that period is not unreasonable as a matter of law.

III. Conclusion

For the foregoing reasons, Petitioner is excluded from participation in Medicare, Medicaid, and all federal health care programs for the minimum statutory period of five years effective August 18, 2011.

/s/
Keith W. Sickendick
Administrative Law Judge